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March 30, 2012

Mr. Corbin R. Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM 2010-33
Arbitration Court Rule - MCR 3.220

Dear Mr. Davis:

While I am a member and officer of the Family Law Council, and concur with the Council posting on ADM 2010-33, this correspondence contains my individual reflections upon ADM 2010-33. The proposed Court Rule is well intentioned, but will dramatically change (for the worse) years of Domestic Relations practice, and under the *law of unintended consequences,* discourage or eliminate Domestic Relations Arbitration.

After nearly forty (40) years of Family Law practice, and nearly a decade of functioning as both a certified Mediator and court appointed Arbitrator, I strongly support the Domestic Relations Arbitration Act. Arbitrations conducted pursuant to the D.R.A.A. have had a tremendous positive influence upon family law practice. Not the least of the benefits are: (1) major reduction in cases going to Trial on the Family Law docket; (2) convenience in scheduling, and an assurance of confidentiality to the parties in difficult or complex family law cases; (3) virtual elimination of Appeals "on the merits" of the Arbitration decision, which clearly reduces the ultimate dockets of the Court of Appeals; (4) it generates hearings and trials which are both flexible and cost effective to the parties because of the implementation of "relaxed" Rules of Evidence, which streamlines the proofs and shrinks the number of witnesses.

Having extolled the merits of Arbitration, there are occasional cases which abuse the process, and vex the Trial courts. A common element of these cases is protracted arbitration proceedings, many times the fault of the parties; sometimes the responsibility lies with the Arbitrator.

I vividly recall a case several years ago where the failure of the Arbitrator to render a decision a year after proofs were taken, was only concluded because I filed a Show Cause against the Arbitrator. However, this did not help the unfortunate client whose property diminished in value $120,000.00 because of this inexcusable delay of 12 months to issue an Opinion.

I concur that an appropriate function of the Trial Court is to set a deadline for conclusion of Arbitration. Notwithstanding, a fundamental flaw in the proposal is the confusion over the role of the Arbitrator; specifically:

- The Arbitrator issues Opinion, or makes rulings resulting in Orders.
- The Arbitrator does not now, and has NEVER been vested with the authority to draft a Judgment or "present a Judgment" to the Trial Court.
- It is the Attorneys who are REQUIRED to present a judgment to the Trial Court in conformity with the rulings of the Arbitrator.
- Many issues are never arbitrated; example, Custody, Parenting Time, Support. However the proposed Court Rule would change existing Michigan law and make an Arbitrator "draft Judgments", not render decisions and Opinions.
- A Judgment containing provisions which were not the subject of Arbitration would generate an automatic appeal by right to the Court of Appeals, and frustrate the purpose of arbitration being "final, binding, and non-appealable".

The remedy of requiring the Arbitrator to "enter a Judgment" puts the Arbitrator in an adversarial position *vis a vis* the parties. The proper remedy is for the Court to Show Cause the attorneys. Not the Arbitrator.

Imposing "sanctions" upon an Arbitrator for conduct of parties will dry up the pool of available Arbitrators in the State of Michigan. No sane arbitrator will volunteer to undertake an arbitration where he/she can be sanctioned for the conduct of parties.

Last but not least, any pragmatic Court Rule would contain the following: "The Court may decline to enter an Order or Judgment until all arbitrator fees are paid in full." Without such protection, the adversarial process embedded in the proposed court rule leaves the arbitrator vulnerable to losing thousands, or tens of thousands, of dollars in well earned fees occasioned by having to undertake the duties of the attorneys for the parties and enter Judgment — a Judgment mind you, which one or both parties may contest before the Trial Court. Nothing would sound the "death knell" for Domestic Relations arbitration in Michigan quicker than implementing the proposed Rule as written.

Prudence suggests appointment of an ad Hoc workgroup, or task force, consisting of members of the Judiciary, the Family Law Section, and ADR representatives, to study the short and long term consequences of the proposal, and fashion carefully targeted remedies geared to eliminate the real problems with Arbitrators and the Courts.

Very truly yours,

James J. Harrington III

JJH/awp
Enclosure

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Order

Michigan Supreme Court
Lansing, Michigan

December 21, 2011

ADM File No. 2010-33

Proposed Adoption of
New Rule 3.220 of the
Michigan Court Rules

On order of the Court, this is to advise that the Court is considering adoption of new Rule 3.220 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

Rule 3.220 Domestic Relations Arbitration

(A) Applicability of Rule. This rule governs statutory Domestic Relations Arbitration under MCL 600.5070-600.5082.

(B) Unless specifically addressed in this rule, the provisions of MCR 3.602 govern arbitrations conducted under the Domestic Relations Arbitration Act.

(C) Deadline for Completion.

(1) Upon entry of the order for arbitration, the Court shall impose a deadline upon the arbitrator for presentment of a judgment of divorce or final order disposing of all matters submitted to the arbitrator.

(2) On a party's or the arbitrator's request for good cause, or on the Court's own initiative, the deadline may be extended by the Court. The deadline may not be extended absent an order of the Court.

(3) Either party may submit a proposed judgment or final order to the Court in accordance with the arbitration award(s). If the parties fail to present a judgment or final order by the deadline, it is the responsibility of the arbitrator to present a judgment of divorce or final order within 14 days following the expiration of the deadline. In the event a judgment or final order is not submitted by the arbitrator within 14 days following the expiration of the deadline, the Court may impose sanctions upon the arbitrator if it determines that the delay has not been caused by the parties. If the delay has been caused by the parties, the Court may impose sanctions on the party responsible.

(4) The judgment of divorce shall not be entered unless all matters set forth in MCR 3.211 are completed including the determination of property rights and until no further action by an arbitrator is necessary to effectuate any matters required under MCR 3.211.

(D) Return of Proceeding to Trial Court. In the event a proposed judgment is not submitted to the trial court in accordance with this rule, the matter shall be scheduled for trial before the trial court.

(E) Interim Arbitration Awards.

(1) To the extent an arbitrator issues interim awards before issuance of the final arbitration award, those awards shall clearly delineate that it is an interim award.

(2) Interim arbitration awards shall automatically become orders of the Court, unless a party submits a motion to correct errors or omissions with the arbitrator within 14 days as provided under MCL 600.5078. In the event a timely motion to correct errors or omissions is filed, the interim order shall become an order of the Court upon the arbitrator's denial of that motion. In the event the motion is granted in whole or in part, the 14-day time period will reset only regarding those matters modified but the unchanged portions of the interim award shall automatically become orders of the Court.

(3) The arbitrator shall submit all interim awards to the Court in the form of an order for entry consistent with this rule.

Staff Comment: Proposed new MCR 3.220 would require the trial court judge to set a deadline for arbitration proceedings and approve any extensions of those time periods. Further, the proposed rule would allow arbitrators to issue interim awards during the arbitration proceeding.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-33. Your comments and the comments of others will be posted at www.courts.michigan.gov/supremecourt/Resources/Administrative/index.htm.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 21, 2011

Clerk